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## Liberalism, Communitarianism, and Public Health: Comments on Lawrence O. Gostin's Lecture

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LIBERALISM, COMMUNITARIANISM, AND PUBLIC HEALTH:  
COMMENTS ON LAWRENCE O. GOSTIN'S LECTURE

*Wendy E. Parmet\**

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Professor Lawrence O. Gostin has long been one of the leading figures in public health law. An amazingly prolific and assiduous scholar, he has written on almost every aspect of public health law, both domestic and international, and in so doing, has brought needed attention and light to the once moribund field. Given his many notable contributions to the subject, it is not surprising that his Dunwoody lecture situates the debate about legal responses to bioterrorism in the context of one of the field's overarching issues: the relationship between individuals and the state. Nor is it surprising that he has chosen to tackle the issue by examining what leading moral theories would say about restrictions on individual liberty taken in the name of public health. This is an important contribution that moves the debate about bioterrorism and public health into the wider realm of political and ethical discourse.

In this brief Commentary, I can scarcely do justice to all of Gostin's analyses and observations. I do hope, however, to continue the dialogue he has started by looking a bit further at his claim that leading ethical theories would support the type of limitations on individual rights that are proffered by the Model State Emergency Health Powers Act (MSEHPA).<sup>1</sup> More specifically, while I accept Gostin's conclusion that both liberals and communitarians will agree that some limitations on individual liberty are justified in the name of the public, I want to explore some distinctions

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1. Lawrence O. Gostin, *When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified*, 55 FLA. L. REV. 1105, 1109 (2003); see CTR. FOR LAW AND THE PUBLIC'S HEALTH, GEORGETOWN UNIV. & JOHNS HOPKINS UNIV., THE MODEL STATE EMERGENCY HEALTH POWERS ACT (Dec. 21, 2001), at <http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf> [hereinafter MSEHPA].

within and between each of these broad movements that may raise additional questions about legal responses to public health. In addition, I want to ask whether public health itself has any insights or perspectives that can add to our discussion of the moral and policy questions posed by bioterrorism.<sup>2</sup> In the conclusion, I argue that it does, and suggest some of the ways that public health, understood as a perspective, can help us view the questions that Gostin has raised for us.

### I. STARTING POINTS

There can be little doubt that the preservation of public health often requires the imposition of laws and policies which limit the freedom of some individuals and firms. In his Dunwoody lecture, Gostin focuses on the threats posed by bioterrorism, but a similar assertion can be made about other threats to public health. For example, it seems beyond dispute that in the wake of the recent Severe Acute Respiratory Syndrome (SARS) outbreak, governments were justified in examining the health of passengers traveling from SARS-affected areas.<sup>3</sup> Indeed, the MSEHPA that Gostin helped draft does not limit the application of emergency powers to incidents of bioterrorism.<sup>4</sup>

Although infectious diseases pose the most glaring example of health threats that may warrant limits on individual freedoms, they do not exhaust the list of candidates. Few would question the appropriateness of laws prohibiting the dumping of raw sewage in a city's water supply or driving seventy-five miles per hour in a school zone. Indeed, to some degree, it is simply obvious, and even banal, to note that as individuals living in society, and not as hermits on a deserted isle, our putative freedoms (and I use the word "putative" pointedly, because one may question whether there can be freedom or a right to act in such a manner) may and must be limited to ensure that we do not harm others. That, I think, is the fundamental lesson not only of *Jacobson v. Massachusetts*,<sup>5</sup> but also of kindergarten.<sup>6</sup>

The question for public health law and ethics, however, is what balances should be struck and what policies should be adopted once we put the obvious, trivial examples aside. To what degree does the good of a population justify limiting the actions or inactions of some individuals? Are we justified in requiring a child to have a Diphtheria, Pertussis,

2. Gostin, *supra* note 1.

3. See World Health Organization, *Summary of WHO Measures Related to International Travel* (June 23, 2003), at <http://www.who.int/csr/sars/travelupdate/en/>.

4. MSEHPA, *supra* note 1, § 104(m).

5. 197 U.S. 11, 26, 29 (1905).

6. See ROBERT FULGHUM, ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN: UNCOMMON THOUGHTS ON COMMON THINGS 6-8 (1989).

Tetanus (DPT) vaccine? In prohibiting a firm from putting particulates in the air? Should states be empowered to quarantine individuals who might or might not have a communicable disease?

To some extent, the answer to all of these questions must depend, as Gostin notes,<sup>7</sup> and as I will stress later, on empirical determinations about the degree of risk to others, the efficacy of the proposed restraint on freedom, and perhaps, the ability of individuals to protect themselves from the perceived harm.<sup>8</sup> But the answer must also depend on some normative assumptions about the proper relationship between individuals and their communities, the value given to health, and the role of the state. Recognizing the importance of these questions, Gostin provides us with a helpful framework for analyzing specific cases, astutely turning to normative theory to defend his contention about where and how the lines should be drawn.<sup>9</sup>

### A. Liberalism

Gostin commences his normative analysis with a discussion of liberalism, which he rightly sees as the “*de facto* political philosophy” of contemporary America.<sup>10</sup> Liberalism, as he notes, is marked by its respect for individuals and their moral agency.<sup>11</sup> Thus, liberals care a lot about individual liberty and accept that individuals are rational actors with preferences and interests that reside apart from their community.<sup>12</sup>

That said, liberalism is a broad umbrella, which encompasses not only George W. Bush (though I doubt he would use the “L” word) and Ralph Nader, but also Immanuel Kant, John Stuart Mill, Ronald Dworkin and John Rawls, as well as innumerable other theorists.<sup>13</sup> As Gostin

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7. Gostin, *supra* note 1, at 1135.

8. RICHARD A. EPSTEIN, IN DEFENSE OF THE “OLD” PUBLIC HEALTH: THE LEGAL FRAMEWORK FOR THE REGULATION OF PUBLIC HEALTH 27 (John M. Olin Law & Econ. Working Paper No. 170, 2d ser. 2002) (arguing that the availability of self-help measures undercuts the legitimacy of coercive measures imposed by the state), *available at* <http://www.law.uchicago.edu/Lawecon/index.html>.

9. Gostin, *supra* note 1, at 1141-58.

10. *Id.* at 1141.

11. *Id.* at 1141-42.

12. ELIZABETH FRAZER, THE PROBLEMS OF COMMUNITARIAN POLITICS: UNITY AND CONFLICT 16-18 (1999). This is not to say that all liberals believe that individual preferences are unaffected or uninfluenced by communities. See JOHN STUART MILL, ON LIBERTY 64-66 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859); JOHN RAWLS, POLITICAL LIBERALISM 22-28 (1993). The point I make here is merely that liberals, for the most part, can understand and conceptualize individual preferences and interests as distinct from the interests and values of their communities.

13. MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 1-13 (2d ed. 1998).

understands,<sup>14</sup> it is always somewhat dangerous to make assertions about liberalism *qua* liberalism as if it were a singular, unified theory.

Gostin responds by focusing on the distinctions between so-called civil libertarians, who cherish freedom of personal action,<sup>15</sup> and economic libertarians, who stress freedom of enterprise.<sup>16</sup> According to Gostin, despite their differences, both of these types of liberals would ultimately agree with his framework for invoking liberty-limiting laws in the face of bioterrorism.<sup>17</sup> Both civil and economic libertarians, he claims, would frown upon the use of such laws when the threat is low and the law is poorly targeted; both would accept such measures when the threat is significant and the law is well targeted; and both would say “it depends upon the facts” when the threat is moderate and the law cannot be finely tuned.<sup>18</sup>

Ah, but as Richard Epstein, the scholar upon whom Gostin relies as his exemplar of economic libertarianism, states, “[t]he devil . . . lies in the details.”<sup>19</sup> No liberal, nor any other serious thinker for that matter, would support significantly repressive measures for no good reason. Nor would any serious theorist deny that states can take actions to prevent clear and obvious dangers to many of their citizens. The debate about bioterrorism planning in particular, and public health law in general, is all about the hard cases—when the risks are uncertain, the efficacy of policies unclear, and the uncertainties manifest.

As we think about this murky gray zone, the disagreements and nuances within the liberal tradition that Gostin leaves unexplored may warrant additional consideration. Most relevant may be the distinctions between consequentialists, who judge the morality of an action by its effects, and deontological theorists, who judge an action’s moral character by its nature.<sup>20</sup> Among consequentialist thinkers, the most important are utilitarians, who focus on the action’s impact on aggregate utility.<sup>21</sup>

At first blush, utilitarians would appear to provide Gostin with his strongest brief. They, after all, evaluate an action (mandatory quarantine, for instance) by its impact on the many. And it is Gostin’s argument that

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14. Gostin, *supra* note 1, at 1142-43.

15. *Id.*

16. *Id.*

17. *Id.* at 1145.

18. *Id.* at 1152-54, 1158.

19. EPSTEIN, *supra* note 8, at 22.

20. PATRICIA ILLINGWORTH & WENDY E. PARMET, *ETHICAL HEALTH CARE* (forthcoming 2004) (manuscript at 1-21, on file with authors).

21. See JOHN STUART MILL, *UTILITARIANISM* 76 (Roger Crisp ed., Oxford Univ. Press 1998) (1863).

bioterrorism presents such a grave threat to the many that, at times, individual interests must be rejected.<sup>22</sup>

Gostin, however, does not purport to rely on utilitarianism to support his claim that liberals would endorse his views. Indeed, he treats utilitarianism as if it were outside the tent of liberalism, claiming that “liberalism is . . . a rejoinder to utilitarianism.”<sup>23</sup> That is surprising both because the classical liberal tradition predates the birth of utilitarianism (John Locke wrote almost one hundred years before Jeremy Bentham),<sup>24</sup> and because many proponents of what Gostin calls economic libertarianism (which he treats as a form of liberalism) are undoubtedly utilitarians.<sup>25</sup>

Regardless of the labels applied, Gostin appears to rely upon an essentially utilitarian argument to support his claim that liberals would endorse limitations on liberty in the face of bioterrorism: to wit, restraints against individual freedoms are justified by the magnitude of the risk of bioterrorism from which individuals cannot protect themselves.<sup>26</sup> Undoubtedly, given the right set of facts and a great enough risk to enough people, many utilitarians will concur. Nevertheless, they may raise some questions about Gostin’s premises and specific conclusions. Most importantly, in constructing his argument, Gostin implicitly assumes that public health protection is undoubtedly a more highly valued good than liberty.<sup>27</sup> Yet, utilitarians are liberals precisely because they assert the individual’s capacity to choose and the subjective nature of preferences.<sup>28</sup>

22. Gostin, *supra* note 1, at 1160. Utilitarianism, of course, has many critics, as do all of the theories discussed below. For the purposes of this Commentary, I shall leave those criticisms, however insightful, aside and focus only on the theories themselves and the points they may raise about limiting individual liberty in the name of public health.

23. *Id.* at 1141. To be sure, Gostin does note and cite Mill for the proposition that not all liberals reject utilitarianism. *Id.* n.195.

24. John Locke first published his *Two Treatises of Government* in 1690. See Thomas I. Cook, *Introduction to JOHN LOCKE, TWO TREATISES OF GOVERNMENT* ix (Thomas I. Cook ed., Hafner Publ’g Co. 1947) (1690). Jeremy Bentham, set forth the “principle of utility” in the *Principles of Morals and Legislation* which was first published in 1789. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., Clarendon Press 1970) (1789). It is difficult, therefore, to see how liberalism, which Locke certainly espoused, served as a rejoinder to utilitarianism.

25. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 10-15 (1992); Martha C. Nussbaum, *The Future of Law and Economics: Looking Forward: Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1206 (1997) (noting that proponents of law and economics are generally utilitarians, although there are inconsistencies between their utilitarian and libertarian beliefs).

26. Gostin, *supra* note 1, at 1160-61.

27. As I shall argue later, public health itself makes a somewhat similar assumption, that public health is an undeniable good. See *infra* text accompanying notes 73-76.

28. E.g., JEREMY BENTHAM, *An Introduction to the Principles of Morals and Legislation*, in A BENTHAM READER 73, 86-87 (Mary Peter Mack ed., 1969); FRAZER, *supra* note 12, at 17-18.

To utilitarians, the good is determined by aggregating individual preferences, which is difficult if there is no common metric with which to compare them.<sup>29</sup> And individuals may or may not value health as their highest goal. Some people after all prefer risky endeavors; some would choose the “right to die,”<sup>30</sup> and others would shout “live free or die.”<sup>31</sup> To a utilitarian, we simply cannot know or assert *a priori* what ranking individuals would give to various goods and what therefore would constitute the aggregate good.

So-called economic libertarians, or those who apply the teachings and perspectives of neo-classical economics to law, attempt to avoid the incommensurability problem by using a common metric (dollars) and substituting wealth (or efficiency) for utility.<sup>32</sup> But they, too, generally reject the notion that government, or anyone, can know *a priori* how individuals value different goods and risks and therefore what constitutes the public good.<sup>33</sup> Indeed, it is precisely because they note that different people place different values on different goods and risks that economists tend to favor market-oriented transactions in which welfare is maximized by aggregating individual transactions. To be sure, market theorists understand that markets have imperfections and that there is a role for governments to play in protecting public health when markets cannot be trusted. Thus, Epstein sees a role for government in providing information for individuals and, at times, he would support quarantining to prevent the spread of communicable diseases.<sup>34</sup> Nevertheless, market theorists remain deeply skeptical of the view that we can assume *a priori* that avoiding ill

29. For a discussion of the impact of this problem on the progressive potential of utilitarianism, see Herbert Hovenkamp, *Knowledge About Welfare: Legal Realism and the Separation of Law and Economics*, 84 MINN. L. REV. 805, 844 (2000).

30. The recognition in American law of a limited “right to die” reflects the liberal respect for autonomy and the liberal belief that not all individuals would value life or health over other goods, such as dignity or independence. See, e.g., Tania Salem, *Physician-Assisted Suicide: Promoting Autonomy—or Medicalizing Suicide?*, 29 HASTINGS CENTER REP. 30 (1999).

31. And some would refuse to do so. See *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (upholding the right of an individual to cover the “live free or die” state motto on automobile license plate).

32. Nussbaum, *supra* note 25, at 1206-07. It should be noted that some economic libertarians, such as Epstein, may also support a natural law view of property rights. See Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL’Y 713, 718 (1989) (arguing that utilitarianism can provide support for the conclusions of natural law thinkers).

33. See, e.g., EPSTEIN, *supra* note 8, at 43; see also Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 368-69 (1991); Lewis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1041 n.153, 1052 n.180 (2001); Thaddeus Mason Pope, *Balancing Public Health Against Individual Liberty: The Ethics of Smoking Regulations*, 61 U. PITT. L. REV. 419, 426 & n.22 (2000) (citing authorities for the proposition that individuals place different values on their health).

34. EPSTEIN, *supra* note 8, at 20-22.

health is the highest goal.<sup>35</sup> They usually seek to confine government action in the name of public health as narrowly as possible. Thus, economic libertarians may well reject the idea that government should have the power to forcibly vaccinate people for smallpox in the event of a terrorist attack when individuals could opt to self-insure against the attack by being vaccinated prior to any incident (if only government would allow that market to work).

Rule utilitarians may also question (but possibly support) the framework that Gostin has given us. Rule utilitarians focus less on the consequences of individual actions and more on the consequences of generalizable rules of conduct.<sup>36</sup> One can imagine a rule utilitarian supporting the framework for analysis that Gostin has provided by envisioning it as the best “rule” for maximizing overall utility. On the other hand, one can well imagine an argument positing that his framework makes it all too easy for government to err on the side of restricting liberty, and that the overall consequences of authorizing the type of abridgment of liberty permitted by the MSEHPA may be greater than the risks of bioterrorism prevented by this type of law.

This possible argument points to the fact that for the utilitarian we need to consider all of the aggregate costs and benefits. We cannot simply weigh the costs to an individual of a restriction on liberty against the benefits to the population at large of preventing the spread of a bioterrorist agent. The calculus that compares one person’s quarantine versus a plague caused by bioterrorism is too easy and too inaccurate. To satisfy the utilitarian, we would need to know the costs imposed on all people and society by enacting laws that give governments more coercive power and might divert resources from other health efforts. We would also have to compare the aggregate cost to individuals and society with the marginal benefit that would be derived from enacting coercive measures (how many lives would be saved if we used coercive rather than voluntary measures when a catastrophe strikes). The calculus thus would put social interests on both sides of the scale. So framed, it becomes harder to know whether restrictive legal measures actually would create more benefit than harm.

If some utilitarians may question the conclusions Gostin reaches, deontological theorists may have even greater qualms. While again there is no single definitive school of deontological thought,<sup>37</sup> this tradition stresses the nature of actions and often contends that there are certain core

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35. See Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1, 3–11 (1993) (arguing for the subjective value of risk-taking).

36. ILLINGWORTH & PARMET, *supra* note 20; MILL, *supra* note 12, at 21.

37. The tradition, at least in its modern incarnation, can be traced to Immanuel Kant. Ronald Dworkin, Robert Nozick and even John Rawls employ aspects of deontological reasoning. See FRAZER, *supra* note 12, at 15–16.



“rights” which ought not be abridged. In arguing that such theorists will accept limitations on private or economic actions in the name of public health, Gostin correctly notes that few (if any) rights theorists would claim that individuals have the right to harm another.<sup>38</sup> True. But while rights theorists generally admit that individuals have no right to intentionally undertake actions to endanger others (because rights of autonomy do not go that far), in contrast to utilitarians such as Peter Singer,<sup>39</sup> many rights theorists hold that an individual can refrain from taking actions to prevent injury to another.<sup>40</sup> Or, to put it another way, deontologists believe that society has no right to require an individual to be a Good Samaritan. This “no duty” rule is well ensconced in our law,<sup>41</sup> and is the source of some of the chief complaints that communitarians wage against liberalism.<sup>42</sup> It also has been enormously influential in the development of contemporary bioethics. Thus, the Nuremberg Declaration posits that each individual has the absolute right to determine whether or not he or she will participate in clinical research.<sup>43</sup> The fact that the individual’s failure to consent to participate may undermine public health and lead to harm to others is no answer to a strong rights theorist. Likewise, the fact that a woman’s refusal to consent to surgery may endanger the life of her fetus does not justify, to most supporters of human rights, the view that the woman can be compelled to have the surgery.<sup>44</sup>

For rights theorists, therefore, the question about whether individual rights can be restricted in the name of public health is a very difficult one, depending not only on the magnitude of the threat and the fine-tuned nature of the law, as Gostin would contend, but also on subtle, or even murky, distinctions between action and inaction and baseline conceptions of rights.<sup>45</sup> From this perspective, governments may take some steps to protect the public good, but they do not have the right to sacrifice some individuals (or their property) for the good of others. As a result, under this

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38. Gostin, *supra* note 1, at 1145-47.

39. See Peter Singer, *Famine, Affluence and Morality*, in *ETHICS IN PRACTICE: AN ANTHOLOGY* 585, 585-93 (Hugh LeFollette ed., 1997).

40. See, e.g., Joshua Dressler, *Some Brief Thoughts (Mostly Negative) About 'Bad Samaritan' Laws*, 40 SANTA CLARA L. REV. 971, 975 (2000); Nancy K. Rhoden, *Cesareans and Samaritans*, 15 LAW, MED. & HEALTH CARE 118, 118-25 (1987).

41. For examples of jurisdictions applying the rule, see 62 AM. JUR. 2D *Premises Liability* § 150 (2003).

42. See, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 93-95 (1991).

43. NUREMBERG MILITARY TRIBUNALS, *NUREMBERG CODE: DIRECTIVES FOR HUMAN EXPERIMENTATION* (1949), available at <http://ohsr.od.nih.gov/nuremberg.php3>.

44. See *In re A.C.*, 573 A.2d 1235, 1237 (D.C. 1990).

45. The insubstantiality of these distinctions has been one of the most noted problems with rights theory by its critics. See Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2278-85 (1990).

tradition, we need to worry about whether a law requiring an individual to be examined or vaccinated without consent constitutes a valid limitation on an action by the individual that is harmful to others, or an inappropriate demand that the individual act against her will for the good of another. Likewise, we may wonder whether an individual who is subject to a quarantine can be viewed either as one posing an impermissible danger to others, or as an innocent victim whose liberty is being sacrificed for the benefit of others.

Importantly, the brands of liberalism discussed by Gostin do not exhaust the range. One surprising omission from the lecture is egalitarian and social contractarian visions of liberalism, like those espoused by John Rawls.<sup>46</sup> Rawls, of course, analyzes questions of justice by reference to what members of a polity would decide were they deciding behind a veil of ignorance, where their own particular life situations would not be known to them.<sup>47</sup> According to Rawls, individuals in this situation would agree upon a “difference principle,” which measures actions taken against its effect upon the worst off in society.<sup>48</sup> This principle may offer a particularly important guidepost for bioterrorism laws, which could well lead to more harm for the most vulnerable. The MSEHPA, for example, permits the most stringent actions to be taken against those individuals who have faced the misfortune of contracting a potentially deadly disease.<sup>49</sup> And, the MSEHPA quarantine and isolation provisions may well have a particularly harsh impact on individuals who are dependent on others, homeless, or lack single family houses where they can be isolated at home. Certainly the history of coercive public health measures should give us reason to worry about their potential for disproportionately harming the worst off.<sup>50</sup> Thus, a Rawlsian perspective may caution us to recall the difference principle in any framework devised for responding to bioterrorism.

None of this is to say that liberals would or should necessarily reject either the framework Gostin sets forth in the lecture or the MSEHPA.<sup>51</sup> Rather, I merely wish to suggest that liberalism is a complex and varied set

46. JOHN RAWLS, *A THEORY OF JUSTICE* 11 (1971). Rawls may also be classified as a rights theorist. *See supra* note 37 and accompanying text.

47. RAWLS, *supra* note 46, at 11-12.

48. *Id.* at 65-70.

49. MSEHPA, *supra* note 1, §§ 601-606.

50. *See* Wendy K. Mariner, *Public Health and Law: Past and Future Visions*, 28 J. HEALTH POL., POL'Y & L. 525, 543-47 (2003) (reviewing LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* (2001)); Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53, 66-71 (1985).

51. It is possible that this framework provides for less extensive intrusions on liberty than the MSEHPA. However, precisely because this framework is presented with a fair degree of generality and lacks the legal language and detail found in the MSEHPA, it is difficult to compare the two.

of theories and perspectives. These different perspectives are worth exploring, as they may provide us with important cautions as we develop and critique laws aimed at preparing us for bioterrorism.

### B. *Communitarianism*

In his lecture, Gostin claims, quite rightly, that “[s]upport for public health and security comes more naturally to a communitarian than to a liberal.”<sup>52</sup> This is because, as Gostin notes, communitarianism is a philosophy that situates individuals within their communities and understands their interests as existing in a relationship with those communities.

As Gostin explains, many communitarians stress the importance of health, especially public health.<sup>53</sup> They also denigrate the importance given to individual rights and autonomy by liberals.<sup>54</sup> Thus communitarians may be less inclined than liberals to be alarmed by the deprivations of individual freedom in the name of public health. Indeed, a recent article in the *Responsive Community*, an avowedly communitarian journal, argues in support of the MSEHPA on the basis of the world’s experience with SARS.<sup>55</sup>

Nevertheless, Gostin may be a bit quick in concluding that communitarianism would necessarily err on the side of granting the government coercive power in cases when the threat of bioterrorism is moderate.<sup>56</sup> If liberals believe that values and preferences are formed by individuals, communitarians are apt to stress that value preferences are determined by and within communities.<sup>57</sup> As a result, communities determine for themselves the value and priority given both to health and to particular individual freedoms. Some communities may well place a high priority on health and security and a low value on individual autonomy. No doubt it is plausible to posit that health is an essential

52. Gostin, *supra* note 1, at 1154.

53. *Id.* at 1154-55; see also DANIEL BELL, COMMUNITARIANISM AND ITS CRITICS 58-62 (1993); AMITAI ETZIONI, THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY 244-47 (1996) (arguing that “[l]ife and health are compelling in and of themselves”); Robert Labonte, *Health Promotion and the Common Good: Toward a Politics of Practice*, in PROMOTING HEALTHY BEHAVIOR: HOW MUCH FREEDOM? WHOSE RESPONSIBILITY? 95, 108 (Daniel Callahan ed., 2000).

54. ETZIONI, *supra* note 53, at 39-40; STEPHEN MULHALL & ADAM SWIFT, LIBERALS AND COMMUNITARIANS 162-64 (1992); Thomas Moody, *Some Comparisons Between Liberalism and an Eccentric Communitarianism*, in THE LIBERALISM—COMMUNITARIANISM DEBATE: LIBERTY AND COMMUNITY VALUES 91, 91-101 (C.F. Delaney ed., 1994).

55. Nicholas D. Kristof, *The Freedom to Infect? SARS and Common Sense*, RESPONSIVE COMMUNITY, Summer 2003, at 4.

56. See Gostin, *supra* note 1, at 1158.

57. See BELL, *supra* note 53, at 38; ETZIONI, *supra* note 53, at 218-23, 257.

ingredient for the flourishing of most communities. But as Gostin notes,<sup>58</sup> a communitarian cannot know that *a priori* because other communities—for example, religious communities which forswear medical treatment—may rely upon a very different set of values.

Indeed, in arguing that communitarians will accept his framework, Gostin implicitly relies upon a relatively static notion of community, one in which “the community” is treated not only as a given, but almost as if it were equivalent to “the state,” which is to wield extraordinary powers in the face of bioterrorism.<sup>59</sup> But, for communitarians, community itself is a complex and flexible concept. Individuals do not belong to single communities. There are communities of worship, communities of identity, and communities of belief. These communities are “reference groups” from which individuals draw an identity, from which they negotiate norms of conduct.<sup>60</sup> Such communities mediate the relationship their members have with the state itself.<sup>61</sup> However, they need not be the state, and community norms and notions of the good life cannot be immediately equated with concepts like national security.<sup>62</sup>

In addition, many communitarians stress the deliberative process of self-governance by which communities come to determine and implement their values.<sup>63</sup> To them, what matters most is not the particular substantive valuation (the relative value of health to liberty) but the community-wide, democratic processes by which those values are determined. In this respect, the MSEHPA and the entire “homeland security project” may be problematic. Although Gostin notes the importance of a democratic process,<sup>64</sup> and advocates involving individuals and communities in shielding,<sup>65</sup> the process employed in the development of the MSEHPA,<sup>66</sup> and indeed, the nation’s response to September 11th, has hardly exemplified the type of deliberative, bottom-up process that communitarians advocate. Shielding, as portrayed by Gostin, seems more

58. See Gostin, *supra* note 1, at 1156-57.

59. Gostin does note that the idea of community is not precise. *Id.* at 1155. However, in asserting that communitarians would support government actions taken to protect homeland security, Gostin treats community as if it were equivalent to a political entity. Indeed, at times he stresses the role of the federal government, *see id.* at 1160, leading the reader to question whether Gostin believes that communitarianism would also support increased power for the federal government.

60. FRAZER, *supra* note 12, at 207.

61. *Id.*

62. Frazer notes the ambiguity within communitarian theory as to whether states can be communities. *Id.* at 72.

63. ETZIONI, *supra* note 53, at 222.

64. Gostin, *supra* note 1, at 1162-63.

65. *Id.* at 1166-68.

66. See Lawrence O. Gostin, *Public Health Law in an Age of Terrorism: Rethinking Individual Rights and Common Goods*, 21 HEALTH AFF. 79, 88-89 (2002).

aimed at garnering the cooperation of communities and the acquiescence of individuals to policies already chosen by others than involving communities in the determination of values and the development of responses to problems.<sup>67</sup> Moreover, the very concept of delegating extraordinary powers to “public health experts,” and trusting these experts to revise or suspend all laws, seems at odds with, at least in spirit, the type of civic deliberation endorsed by communitarians.<sup>68</sup>

Given their emphasis on community responsibility, communitarians stress not only the limitation of rights, but the existence of mutual duties. Yet, under Gostin’s formulation, legal responses to bioterrorism would provide for very little in the way of duties as they are portrayed by communitarians. First, while he argues that the government must have power to respond to bioterrorism, the MSEHPA does not impose duties on the government. Indeed, under the MSEHPA, the government itself is immune from claims that it failed to secure either the health of the public or the needs of individuals taken into custody.<sup>69</sup> But more importantly, neither the act nor Gostin’s framework provides for mutual duties or civic engagement. Instead, they divest (as does the entire “homeland security project”) responsibility to relatively remote and often unaccountable government agents to “take care of the problem.” This seems very distinct from the type of reciprocal obligations between citizens envisioned by communitarians.

Finally, and importantly, through their critique of liberalism and its emphasis on rights, communitarians stress the evolution and importance of communally-enforced extra-legal norms. Amitai Etzioni writes that “for a society to be communitarian, much of the social conduct must be ‘regulated’ by reliance on the moral voice rather than on the law, and *the scope of the law itself must be limited largely to that which is supported by the moral voice.*”<sup>70</sup> This suggests that for communitarians, law itself—at least in its formal, statutory, or adjudicatory incarnation—should play a relatively small role in our efforts to confront public health threats, whether they arise from bioterrorism or other sources.<sup>71</sup> The type of formal delegation of powers overseen by the construction of legal standards and

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67. See Gostin, *supra* note 1, at 1166-68.

68. See, e.g., FRAZER, *supra* note 12, at 209-17 (“Political communitarians are skeptical about the power of the state . . . . Republicanism seeks to build, by means of public participation and decision, a society in which citizens enjoy the dignity which comes with fully participating in political decisions about the economic, social, and political structures that will govern them.”).

69. MSEHPA, *supra* note 1, § 804.

70. ETZIONI, *supra* note 53, at 139; see also FRAZER, *supra* note 12, at 139.

71. Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649, 653 (1995).

judicial process envisioned by Gostin appears far more liberal than communitarian in its design.

None of this is to say that communitarians would disagree with Gostin's ultimate conclusion that liberty at times needs to be restrained in the face of public health threats; although communitarians might dissent from his phrasing of the question in that very liberal, individual versus community, mode. Many communitarians will concur that public health is for most communities part and parcel of the common good and that the state may take coercive measures against individuals and firms in order to advance that common good. But communitarianism, like liberalism, is a complex and heterogeneous body of thought that may raise many useful, and even conflicting questions about our responses to bioterrorism. We should follow Gostin's lead and continue to probe its different strands and ponder the questions communitarians raise about our public health laws and the ways in which we make them.

### C. *Public Health Perspectives*

In his Dunwody lecture, Gostin has used liberal and communitarian theories to support limited restrictions on individual liberty in the face of bioterrorist threats. In doing so, Gostin has added useful rigor to our debates about bioterrorism preparedness and has implicitly challenged us to assess public health interventions in light of leading moral theories. This is an important task that we would be wise to heed as we draft and evaluate legal responses.

There is also, I think, an additional way to view the question. Instead of applying pre-existing moral or ethical theories to a public health problem, one can imagine turning the analysis upside down, and asking what light public health's own perspectives and teachings would shed both on some questions raised by our moral theories and the more concrete issue of public health preparedness. Importantly, public health, even more so than liberalism and communitarianism, is not a singular theory with an all-encompassing analysis.<sup>72</sup> Nevertheless, one can discern within the field and its teachings several assumptions and perspectives (none of which everyone within will share) that distinguish it from liberalism and/or communitarianism, and that might offer a different vantage point for assessing policy issues. In this Part, I will attempt to outline broadly three ways in which public health differs from the predominant chords within liberalism and communitarianism. In the conclusion, I will try to sketch what light those differences may shed on the subject of bioterrorism and the law.

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72. Wendy E. Parmet & Anthony Robbins: *Public Health Literacy for Lawyers*, 31 J.L. MED. & ETHICS (forthcoming 2003).

Perhaps the most obvious distinction between public health and liberalism is public health's assertion that the health of a population is an objective good, measurable by objective criteria (i.e., morbidity, longevity, etc.),<sup>73</sup> and not simply a matter of individual choice and preference. This assertion is also implicit in Gostin's defense of bioterrorism planning, and as noted above, distinguishes his perspective from liberals who generally assume that preferences are subjectively determined.<sup>74</sup> Hence, from a public health perspective, the protection of public health may be seen as justifying actions that liberals would decry as paternalistic<sup>75</sup> and that economists would condemn as irrational or inefficient from a cost-benefit analysis perspective.<sup>76</sup> The public health perspective may also critique choices made by particular communities that value practices or activities more than the health they threaten.

Public health also differs from liberalism in its emphasis on populations. Indeed, if there is a single characteristic that is descriptive of public health, it is the focus on populations.<sup>77</sup> Of course, utilitarians are also concerned with the many, but as noted before, they determine what constitutes the good of many by aggregating individual preferences. Public health, in contrast to utilitarian liberalism, but in accord with communitarianism,<sup>78</sup> takes populations as the primary unit of analysis and concern, and sees the members of populations as being interdependent in numerous, important ways. Most obviously, public health focuses on the

73. E.g., Barry S. Levy, *Creating the Future of Public Health: Values, Vision, and Leadership*, 88 AM. J. PUB. HEALTH 188 (1998) (describing the values of public health).

74. In addition, it should be noted that a public health perspective may value the health of a population even more than particular communities. See, e.g., Jeffrey P. Baker, *Immunization and the American Way: 4 Childhood Vaccines*, 90 AM. J. PUB. HEALTH 199 (2000).

75. Henry Mather, *Natural Law and Liberalism*, 52 S.C. L. REV. 331, 355 (2001) (noting liberals' distaste of paternalism).

76. To be sure, writers within the liberal tradition, like Norman Daniels, have argued that health itself is a primary good because of its importance in permitting individuals to exercise other choices. See generally NORMAN DANIELS, *JUST HEALTH CARE* (1985). Utilitarians and neo-classical economists, however, are far more likely to stress the subjective value that people place upon their health. And they are far less likely than those writing within a public health tradition to accept the idea that the health of the group is a good apart from and regardless of the aggregation of individual preferences.

77. LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 11-14 (2000).

78. Communitarians, however, treat community as more than a "simple aggregation, as a population is." See FRAZER, *supra* note 12, at 68. To communitarians, community implies a sharing of values and transcendence, *id.* at 83-85, that is quite absent from the epidemiologists' concept of population, which imports no metaphysical or normative concept to the group. For epidemiologists, populations are changing entities designated by research designs. Populations may share values, or they may contest them, and be characterized by very different attributes; "women born in Massachusetts in 1980," for example. Thus to public health, populations are necessarily more contingent than are communities. See, e.g., ALAN J. SILMAN & GARY J. MACFARLANE, *EPIDEMIOLOGICAL STUDIES: A PRACTICAL GUIDE* 53-54 (2d ed. 2002).

ways in which individual health is determined by and a function of the health of a given population. As Gostin clearly shows, when it comes to communicable diseases, the fate of individuals is often dependent upon the health of others, and the actions taken or not taken by them and their government.<sup>79</sup> But contrary to the views of utilitarian libertarians, such as Epstein,<sup>80</sup> public health demonstrates that interdependencies extend beyond the realm of communicable diseases and even beyond the realm of what are commonly understood to be public goods. For example, social epidemiologists have taught us that an individual's risk of contracting a particular health condition, like high blood pressure, may be affected more by the society in which the individual resides than any personal attribute, such as genes or behavior.<sup>81</sup> Indeed, most cases of an illness like hypertension may occur not among the outliers who are at "high risk" for the disease, but among those individuals who have no discernable risk factor, other than living in a particular society in which the condition is highly prevalent.<sup>82</sup> This certainly casts doubt upon the liberal assumption that individuals can be free to choose their own levels of risk.

Social epidemiologists also have demonstrated a strong association between an individual's relative social status and his or her health.<sup>83</sup> Some epidemiologists contend that the health of a society as a whole is affected by the degree of inequality within that society.<sup>84</sup> Health also may be affected by racism, sexism, and other forms of discrimination.<sup>85</sup>

Importantly, public health studies show that not only are health outcomes determined at the population level, but that individual choices and preferences that affect health also are partially determined by social and environmental factors.<sup>86</sup> Thus, marketing campaigns may influence smoking behaviors.<sup>87</sup> Likewise, individual eating habits, and therefore weight, appear to be significantly affected by a variety of social factors.<sup>88</sup>

79. Gostin, *supra* note 1, at 1147-48.

80. EPSTEIN, *supra* note 8, at 35.

81. GEOFFREY ROSE, *THE STRATEGY OF PREVENTIVE MEDICINE* 47-63 (1992).

82. *Id.* at 48-50.

83. Scott Burris et al., *Integrating Law and Social Epidemiology*, 30 J.L. MED. & ETHICS 510, 512 (2002).

84. See Kim Lochner et al., *State-Level Income Inequality and Individual Mortality Risk: A Prospective, Multilevel Study*, 91 AM. J. PUB. HEALTH 385, 385 (2001).

85. See Kevin Fiscella et al., *Inequality in Quality: Addressing Socioeconomic, Racial, and Ethnic Disparities in Health Care*, 283 JAMA 2579, 2579-84 (2000).

86. KAREN GLANZ ET AL., *HEALTH BEHAVIOR AND HEALTH EDUCATION: THEORY, RESEARCH, AND PRACTICE* 464 (2d ed. 1997).

87. M.C. Farrelly et al., *Youth Tobacco Prevention Mass Media Campaigns: Past, Present, and Future Directions*, 12 TOBACCO CONTROL 35, 35-48 (2003); Louise Ann Rohrbach et al., *Independent Evaluation of the California Tobacco Control Program: Relationships Between Program Exposure and Outcomes, 1996-1998*, 92 AM. J. PUB. HEALTH 975, 979-82 (2002).

88. Elizabeth Goodman, *Letting the "Gini" Out of the Bottle: Social Causation and the*



These social forces also can operate at the community or population level, questioning the very notion of framing public health problems as raising conflicts between individuals and the state. Less obviously, public health's emphasis on the social construction of preferences and behaviors may cast into doubt the communitarian assertion that groups can determine their own values via deliberation.

Finally, public health differs markedly from strands of both liberalism and communitarianism in its reliance on empiricism. Neo-classical economics, in particular, is a highly formal, deductive construct, that draws normative conclusions based upon deductions from a model of human behavior.<sup>89</sup> Communitarianism, while far less formal, remains highly normative. Although it is based on a theory of human nature that is informed by observation,<sup>90</sup> communitarianism is ultimately a moral/political theory, rather than an empirical methodology. Public health, in contrast, is ultimately an empirical endeavor.<sup>91</sup> To be sure, it begins, as do all sciences,<sup>92</sup> with underlying assumptions and constructs (the population perspective, for example). But to the extent that it offers guidance or normative suggestions, it does so based upon observation (contemporaneous and historical) abetted by statistical analysis (using the disciplines of biostatistics and epidemiology).<sup>93</sup> As a result, public health's prescriptions are inevitably open to contest and reexamination, a fact that probably drives the public crazy as public health offers different advice from year to year (carbohydrates are good for you, they're bad for you).

By noting these observations about public health and its contrast to liberalism and communitarianism, I do not mean to suggest that all individuals who think about or do public health work would agree with each (or any of) the premises outlined above. Clearly they would not. Moreover, I do not claim that public health provides a comprehensive

*Obesity Epidemic*, 143 J. PEDIATRICS 228, 228-30 (2003) (editorial).

89. RICHARD A. POSNER, AN ECONOMIC ANALYSIS OF LAW §§ 1.1-.4 (1998). Recently other forms of economics with a more empirical proclivity, like behavioral economics, have begun to influence legal debates. See, e.g., Colin Camerer et al., *New Perspectives and Legal Implications: Regulation for Conservatives: Behavioral Economics and the Case for 'Asymmetric Paternalism,'* 151 U. PA. L. REV. 1211 (2003); David A. Dana, *A New Social Scientific Assessment of Law and Human Behavior: A Behavioral Economic Defense of the Precautionary Principle*, 97 NW. U. L. REV. 1315, 1315 (2003).

90. See, e.g., ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE ix (1985).

91. See BERNARD J. TURNOK, PUBLIC HEALTH: WHAT IT IS AND HOW IT WORKS 19, 33 (1997) ("Public health differs from other systems in one important respect: its outcomes . . . . For public health, the bottom line is improved health status in the population.").

92. See generally THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

93. ANDREW C. HARPER & LAURIE J. LAMBERT, THE HEALTH OF POPULATIONS: AN INTRODUCTION 5-6 (2d ed. 1994).

world vision or that its perspectives are ultimately superior to those provided by either liberalism or communitarianism. Nevertheless, public health's own insights are worth bringing to bear on the question of how the state should prepare for bioterrorism.

## II. PUBLIC HEALTH AND BIOTERRORISM

The public health perspectives outlined above do not provide any definitive analysis of what actions the state ought to take to confront possibilities of bioterrorism. Nor can these perspectives form the sole guideposts for legal analysis, which invariably must take into account a myriad of other considerations, including legal precedent, the norms and modalities of legal reasoning, and the teachings of moral theories. Nevertheless, public health's perspective can contribute, I believe, to our discussion of the issue.

First, to the extent that public health's assertion—that the public's health is an objective good—is accepted, it helps validate the initiative to prevent morbidity or mortality from bioterrorism. From a public health perspective, the value of a population's health is not simply a question of preferences or cultural deliberation. It is an objective value worthy of concern, period.<sup>94</sup> This means that if bioterrorism is a threat to a population's health, it is a legitimate target of concern and intervention, even if the public is not thinking about or caring about it at the moment. This is a view evident in old case law, but less prevalent today as both rights theory and utilitarianism in the guise of neo-classical economics have led judges to question whether health is indeed an important and legally recognizable value.<sup>95</sup>

Second, and more importantly, public health's teaching about both the importance of populations and their interdependencies provides a firm justification for government to take actions in order to prevent populations from being harmed by bioterrorism. As Gostin reminds us, bioterrorism is not something that individuals can protect themselves from (not withstanding the government's advice last winter to purchase and use duct tape).<sup>96</sup> Bioterrorism, like SARS, asthma, and a million and one other threats, affects populations and can be best addressed at the population

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94. Of course, it is just this axiom with which critics, especially neo-classical economists, are apt to differ.

95. See Richard A. Daynard, *Regulating Tobacco: The Need for a Public Health Judicial Decision-Making Canon*, 30 J.L. MED. & ETHICS 281, 281 (2002); Wendy E. Parmet, *Legal Rights and Communicable Disease: AIDS, the Police Power, and Individual Liberty*, 14 J. HEALTH POL., POL'Y & L. 741, 748-62 (1989).

96. Gostin, *supra* note 1, at 1160; see also Philip Shenon, *Threats and Responses: Precautions; Administration Gives Advice on How to Prepare for a Terrorist Attack*, N.Y. TIMES, Feb. 11, 2003, at A16.

level. Thus, public health provides a very different and far less skeptical lens on government action than does either liberalism, or potentially communitarianism.<sup>97</sup>

The need and justification for population-based approaches, however, does not necessarily require or sanction the type of coercive interventions contemplated by the MSEHPA. For one thing, the very interdependency of populations that is core to the public health perspective and that justifies population-based interventions, should cast doubt on framing public health problems as a contest between individuals and the public. Ironically, Gostin's discussion of bioterrorism, by focusing on the power of the state over individuals and the way that power can be limited by legal processes, actually derives from a liberal perspective that assumes that the good of the individual exists apart from the good of the population, and the ability of legal processes to serve as a neutral device, to ensure the impartiality of decisions harmful to the individual.<sup>98</sup> A population perspective, in contrast, may well question not only whether the individual can be viewed as having preferences or rights apart from the population, but whether the focus on limiting those preferences or rights is in fact the best way to address the problem. Gostin does advocate other population-based approaches to address bioterrorism, like the retooling of the public health infrastructure.<sup>99</sup> Still, he remains convinced that when push comes to shove, it comes to the individual versus the state.

Public health's focus on interdependency may also lead us to ask not only whether we can limit individual rights, but the degree to which the application of coercive, and indeed frightening, measures upon individuals will itself be harmful to public health. Thus, we must care not only about the "rights" of the individual subject to quarantine or forced vaccination (as the rights theorist would do), but the impact of those measures on social solidarity and the ability of a community to confront a threat.<sup>100</sup> Here, there is much reason to believe, as Gostin has written elsewhere, that coercive measures may actually be corrosive of population health and

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97. This is to the extent that communitarianism is understood as stressing reciprocal extra-legal relationships, not the formal invocation of state authority. *See supra* text accompanying notes 70-71.

98. Liberals generally profess a commitment to the rule of law which entails legal recognition of rights and a separation of law from politics. Legal-process theorists are liberals who especially value the neutrality of the law and legal processes. *See* Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1, 8-10, 21-34 (1999).

99. *See* Gostin, *supra* note 1, at 1128-31.

100. *See, e.g.*, Peter A. Gorski, *Caring Relationships: An Investment in Health?*, 115 PUB. HEALTH REP. 144, 144-50 (2000); Ichiro Kawachi et al., *Long Live Community: Social Capital as Public Health*, 8 AM. PROSPECT 56, 56-57 (1997). George Annas made this precise point in his criticism of the MSEHPA. *See* George J. Annas, *Bioterrorism, Public Health, and Human Rights*, 21 HEALTH AFF. 94, 94-97 (2002).

respect for individual dignity, and egalitarian approaches may be more supportive of public health.<sup>101</sup> Thus, public health itself may come around to supporting the liberal's concern for human rights and the communitarian's concern for participation and deliberation, not as goods in themselves, but because they may help create a community conducive to health. Certainly, regimes that are repressive and disdainful of human dignity are not often associated with positive public health outcomes. Indeed, while the use of surveillance and rapid isolation has been credited with limiting the spread of SARS, even with that air-borne disease, which posed the strongest case possible for mandatory isolation, the verdict is still out as to whether coercive measures themselves did more harm than good. Certainly there is reason to wonder whether SARS would have spread as rapidly as it did had it first made its appearance in a more open and less repressive a society than China.<sup>102</sup> And we do not know whether the epidemic in Canada would have spread further or been halted earlier if that country had a less secure tradition of protecting individual rights and providing for social welfare. Moreover, the history of past quarantines certainly should give pause before one assumes that they actually benefit the public's health.<sup>103</sup>

Importantly, while I have written elsewhere about my worries and qualms about the MSEHPA,<sup>104</sup> public health's emphasis on empiricism cautions me to conclude with the observation that we really don't know the answer to the questions posed. We do not know the risks of bioterrorism; nor do we know either the risks or benefits of preparing for it, or revising our laws to provide states additional emergency powers. It may well be that if a catastrophe arises, the clarification of legal power will prove useful and a population may be saved. But it is also possible that emergency powers can be abused, that "code oranges" will prove to be misguided,<sup>105</sup> that due process hearings will not provide much protection, and that more harm than good will come from the displacement of energy

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101. LAWRENCE O. GOSTIN & ZITA LAZZARINI, HUMAN RIGHTS AND PUBLIC HEALTH IN THE AIDS PANDEMIC 69 (1997).

102. Marwaan Macan-Markar, *Health-East Asia: SARS Outbreak Draws Contrasting Responses*, INTER PRESS SERVICE, Apr. 4, 2003.

103. Parmet, *supra* note 50, at 55-71.

104. See, e.g., Wendy E. Parmet, *Quarantine Redux: Bioterrorism, AIDS and the Curtailment of Individual Liberty in the Name of Public Health*, 13 HEALTH MATRIX 85 (2003).

105. Gostin seems to equate a "code orange" state with the "moderate risk" scenario for which he thinks we should accept some government limitations. See Gostin, *supra* note 1, at 1136. On the problems and confusion associated with the government's declarations of "code orange" and its efforts to determine and warn the public about threat levels, see Anya Sostek, *Orange Crash: The Confusion and Cost of Complying with National Terror Alerts are Driving Cities to Question the Whole System*, GOVERNING, Aug. 2003, at 18.

and resources from common everyday killers to bioterrorism.<sup>106</sup> Indeed, if the history of public health law teaches us anything, it is that we need to be open and skeptical to uncontested claims about what will best promote the population's health. With that claim, I suspect, neither liberals nor communitarians would disagree.

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106. *See* Parmet, *supra* note 104, at 110-15.